IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GARY MICHAEL STREITLER, Appellant.	)	No. 63243-4-I DIVISION ONE UNPUBLISHED OPINION FILED: May 3, 2010

Appelwick, J. — Streitler appeals his sentence for burglary and robbery. He claims that the two crimes constitute the same criminal conduct, and that his attorney was ineffective for failing to raise this issue at sentencing. Because Streitler cannot establish prejudice, he cannot establish ineffective assistance of counsel. We affirm.

FACTS

On July 9, 2008, Gary Streitler, who is homeless, visited the University District in order to steal items. He entered the University of Washington Health Sciences Building, which is open to the public, wearing a University of Washington t-shirt and carrying a stolen backpack. The backpack was loaded with bolt cutters and other tools, along with personal items and other stolen items. He stowed the backpack and used

the bolt cutters to remove the locks from several student lockers. He found another backpack which he filled with the tools, locks, and other stolen items. He then proceeded to the T-wing.

Polina Zayko, a teaching assistant, arrived at her office to hold office hours. The office, room T-382, was for the private use of teaching assistants and accessible only by a key. Zayko set down her laptop and purse, containing her iPod and identification, then turned off the lights and left the room leaving the door open, going next door to speak with her professor. When she returned minutes later, her belongings were gone. Zayko went down the hall and spotted Streitler holding her laptop. She also noticed her purse inside an open backpack next to him. She leaned over and grabbed the laptop and the purse, noticing immediately that her iPod was missing from the purse. Zayko asked Streitler if he had anything else of hers, and he indicated no. When she asked for her iPod back, he clutched the backpack, turned, and fled.

Zayko chased Streitler, still carrying her belongings and demanding her iPod. When she caught up with him and reached for the backpack, he shoved her against some lockers and kept running. Dropping the purse and laptop, Zayko continued to chase him. Seeing a person coming towards them in the hallway, Zayko called out to the person to stop Streitler. The person, Micayla Hinds, stood in the center of the hallway to block Streitler. He pushed Hinds out of the way, injuring her.

Zayko caught up with Streitler and attempted to reclaim the backpack. The two struggled with the backpack until Streitler pushed Zayko backwards by her neck. Finally, a bystander intervened, separated Streitler from Zayko, and restrained him until the police arrived. Zayko reclaimed the backpack and found her iPod immediately.

Streitler was charged with first degree robbery, first degree burglary, and third degree assault. The State argued at trial that Streitler committed first degree burglary when he entered Zayko's private office with the intent to commit a crime and assaulted Zayko. The State argued that Streitler committed first degree robbery when he overcame Zayko's resistance to his retention of her iPod in the backpack after she confronted him about it, as well as the assault of either Zayko or Hinds.[1] Finally, the State based the third degree assault charge on the bodily injury inflicted on Hinds.

The jury found Streitler guilty on all counts. At sentencing, Streitler stipulated to his criminal history and offender score. Defense counsel did not raise the issue of whether the three convictions constituted the same criminal conduct. The court imposed concurrent standard range sentences of 87 months on the robbery and burglary counts and 29 months on the assault count.[2]

Streitler appeals.

DISCUSSION

I. Ineffective Assistance

The issue on appeal is whether Streitler received ineffective assistance of counsel when his attorney failed to argue that the burglary and robbery charges

[1] The facts of either assault could have supported the robbery charge. The jury returned only a general verdict on the robbery charge therefore it is unclear which assault the jury used to support the robbery charge.

[2] The offender score was calculated as nine for the burglary, seven for the robbery, and six for the assault. The court imposed concurrent standard range sentences of 87 months on both the robbery and burglary counts, and 29 months on the assault count. The offender score resulted in a presumptive sentence range of 87 to 116 months for the first degree burglary, 87 to 116 months for the first degree robbery, and 22 to 29 months for the third degree assault. Streitler argues that had the burglary and robbery charges been considered same criminal conduct, the ranges would have been 67 to 89 months for burglary, 77 to 102 months for robbery, and 17 to 22 months for assault.

constituted the same criminal conduct. A defendant may raise the issue of same criminal conduct for the first time on appeal in the context of an ineffective assistance of counsel claim, even if he did not raise the argument in the trial court. See State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Here, then, Streitler must show that it was objectively unreasonable not to raise a same criminal conduct argument, and that there is a strong probability such an argument would have been successful had it been raised. If one of the two prongs of the test is absent, we need not inquire further Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Under chapter 9.94A RCW, the Sentencing Reform Act of 1981, multiple current offenses are presumptively counted separately in determining a defendant's offender score unless the trial court finds that current offenses encompass the "same criminal

conduct." RCW 9.94A.589(1)(a).[3] Two crimes constitute the same criminal conduct only if they share each of three elements: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. Id. If any one of these elements is missing, multiple offenses cannot encompass the same criminal conduct, and must be counted separately in calculating the offender score. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). We must narrowly construe the statutory language to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000); State v. Palmer, 95 Wn. App. 187, 191 n.3, 975 P.2d 1038 (1999).

The standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the next. Vike, 125 Wn.2d at 411. In this context, intent is not the mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). The fact that one crime furthered commission of the other may indicate the presence of the same intent. Id.; State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). If the facts clearly

[3] RCW 9.94A.589(1)(a) provides,

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

demonstrate either the same objective intent or a change in objective intent, the issues will be resolved as a question of law. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991). "If the facts are sufficient to support either finding, then the matter lies within the trial court's discretion, and an appellate court will defer 'to the trial court's determination of what constitutes the same criminal conduct when assessing the appropriate offender score.'" Id. (quoting State v. Burns, 114 Wn.2d 314, 317, 788 P.2d 531 (1990)).

Ordinarily our review is limited to determining whether the trial court's calculation of the offender score represents a clear abuse of discretion or is based on a misapplication of the law. State v. Burns, 114 Wn.2d 314, 317, 788 P.2d 531 (1990); State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993); State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994) (determination of same criminal intent reviewed for abuse of discretion or misapplication of the law). But, when the claim is ineffective assistance of counsel we must determine the likelihood that the crimes would have been found to be the same criminal conduct had the issue been argued.

In the present case, Mr. Streitler committed the crimes of burglary and robbery. At sentencing, Streitler's counsel did not argue that the two offenses were the same criminal conduct. In determining whether the crimes would have been the same criminal conduct, neither party disputes that the crimes occurred in the same time and place with the same victim. The parties dispute only whether Streitler changed his criminal intent.

Streitler contends that his criminal intent when he unlawfully entered the building was to steal property, and that his intent did not change between the burglary and the

robbery. In fact, Streitler's objective intent changed when he encountered the property owner Zayko. He had not planned on confronting the owner of the property to rob her. In general, the objective criminal purpose of robbery, as determined by the courts, is to "acquire property." State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237, 749 P.2d 160 (1987). Here, Streitler had already acquired Zayko's iPod and sought only to retain it and flee when she demanded it back. The objective intent of the burglary was to steal property, whereas the objective intent of the robbery was to retain the property and get away from the scene. The two crimes did not share the same criminal purpose.

Further, RCW 9A.52.050[4] authorizes separate punishment for burglary and other crimes committed during the burglary, even where the offenses would ordinarily constitute the same criminal conduct. Lessley, 118 Wn.2d at 781–82. The sentencing judge has the discretion to apply the burglary anti-merger statute and charge each crime separately. Id. at 782. Given the facts, it is unlikely that the trial court would have found that the robbery was the same criminal conduct as the burglary.[5,6]

---

[4] RCW 9A.512.050 provides in relevant part, "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

[5] Streitler notes in his brief that the trial court sought to impose the minimum punishment. Therefore it is likely that the court would have exercised its discretion in Streitler's favor. The trial court did in fact find that "[t]he facts in this case are somewhat less serious than we find in most robbery in the first degree cases," and that a "low end sentence of this very high range is appropriate." Although RCW 9A.52.050 gives a sentencing judge the discretion to charge crimes separately even if they constitute the same criminal conduct, it does not give a judge the discretion to find two convictions constitute the same criminal conduct where they factually are not.

[6] The State urges this court to find that the sentencing judge made an implicit determination that the burglary and robbery convictions did not constitute the same criminal conduct, citing State v. Nitsch, 100 Wn. App. 512, 525–26, 997 P.2d 1000 (2000), State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998), and State v. Channon, 105 Wn. App. 869, 877, 20 P.3d 476 (2001). Although an application of these cases would be appropriate if we were reviewing the same criminal conduct issue

Though Streitler need not show with certainty that the outcome of his sentencing would have been different, he must demonstrate the reasonable probability of a different outcome. Thomas, 109 Wn.2d at 226. He cannot do so, and therefore fails to meet the prejudice prong of the Strickland test. We reject his arguments and affirm.

II. Statement of Additional Grounds

Streitler contends in his statement of additional grounds that he did not remain unlawfully because the building, a university, was open to the public. Unlawful remaining occurs when (1) a person has lawfully entered a building pursuant to invitation, license, or privilege; (2) the invitation, license, or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the building. State v. Thomson, 71 Wn. App. 634, 640–41, 861 P.2d 492 (1993); see also State v. Collins, 110 Wn.2d 253, 261, 751 P.2d 837 (1988) (a person's lawful presence in a building may become unlawful because of an implied limitation on or revocation of the person's privilege to be on the premises). Here, the State alleged that Streitler entered or remained unlawfully in Zayko's office, which was not open to the public.

Streitler exceeded the scope of the license when he entered private offices not open to the public. RCW 9A.52.010(3) ("A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public."). Also, Streitler's

---

directly, here we are in fact only determining the likelihood that the crimes would have been found to be the same criminal conduct had the issue been argued in order to determine whether Streitler received ineffective assistance of counsel. Therefore, we need not resolve whether the trial court made an implicit determination on the same criminal conduct issue.

license to be in a public university building was impliedly revoked when he committed a crime on the premises. See Collins, 110 Wn.2d at 261. Streitler presents no legal basis for reversal, therefore we affirm.

WE CONCUR: